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Supreme Court of the United States

OCTOBER TERM 1931

No. 98

ARIZONA GROCERY COMPANY, a Corporation,

Petitioner,

vs.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, BAY TRANSPORT COMPANY, a Corporation, and SOUTHERN PACIFIC COMPANY, a Corporation,

Respondents.

ARIZONA GROCERY COMPANY, a Corporation,

Petitioner,

vs.

SOUTHERN PACIFIC COMPANY, a Corporation, and SANTA MARIA VALLEY RAILROAD COMPANY, a Corporation,

Respondents.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINION OF THE COURT BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit in the instant case is reported in 49 *Fed.* (2*d*) 563. No opinion was rendered by the District Court

in these cases. However, the court rendered Findings of Fact and Conclusions of Law, which are set forth in the record (R. 355-375).

JURISDICTION

1. This court on the 12th day of October, 1931, granted the Petition for Writ of Certiorari filed herein by the petitioner.

2. The date of the judgment of the Circuit Court of Appeals to be reviewed is March 23, 1931 (R. 462).

3. This review was sought and allowed by this court under the provisions of Section 240 of the Judicial Code as amended by the Act of February 13, 1925, 43 *Stat.* 938, 28 *U. S. C. A., Sec.* 347.

4. The present case is a civil one, heard and determined in the Circuit Court of Appeals for the Ninth Circuit upon appeal from the District Court of the United States for the District of Arizona, and involves the construction, application and interpretation of the Interstate Commerce Act, a Federal statute (R. 438).

STATEMENT OF THE CASE

The present case is one arising under the Federal Transportation Act. The question involved turns upon the construction and interpretation of portions of this Act and involves the constitutionality thereof. The facts are as follows:

The Interstate Commerce Commission on the 11th day of March, 1929, granted the petitioner an order of reparation against the respondent carriers (R. 321-323). This order was made in conformity with the findings and opinion of the Interstate Commerce Commission, in which the Commission found that the respondent carriers had charged the petitioner and others unreasonable rates on sugar moving into Phoenix, Arizona, from various points in California. This decision is entitled *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, and is reported in 140 *I. C. C.* 171. This opinion is also set forth in the record (R. 290-319).

The respondent carriers refused to comply with the order of the Interstate Commerce Commission (R. 262). Two actions were duly filed by the petitioner in the United States District Court for Arizona against the respondent carriers, based upon this order of the Interstate Commerce Commission and in conformity with Section 16 (2) of the Transportation Act, 49 *U. S. C. A., Sec.* 16 (2), (R. 2-8; 48-54). The cases were tried by the court, sitting without a jury. There was practically no issue of fact, the matter having been submitted to the court on an Agreed Statement of Facts (R. 254-319). The District Court sustained the order of the Interstate Commerce Commission and ordered judgments in accordance therewith and in favor of your petitioner (R. 225, 228). From these judgments the respondent carriers prosecuted an appeal to the United States Circuit Court of Appeals for

the Ninth Circuit. The two cases were presented to the Appellate Court on a consolidated record and treated as one case. The Appellate Court reversed the judgments of the trial court and found the order of the Interstate Commerce Commission to be invalid (R. 438-462; 464).

The Agreed Statement of Facts upon which the cases were submitted to the trial court sets forth the following essential facts: On June 22, 1921, the Interstate Commerce Commission rendered its decision entitled *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Director General, et al.*, 62 *I. C. C.* 412. In that decision the Commission found that for the future rates on sugar in carloads from all points in California to Phoenix, Arizona, should not exceed 96.5 cents.* The defendant carriers were ordered to establish, on or before September 17, 1921, rates not exceeding the figure named. A copy of the Commission's opinion and order is embodied in the record (R. 152-163). On September 17, 1921, the carriers established a rate of 96 cents. That rate was afterward twice voluntarily reduced, first to 86.5 cents (July 1, 1922) and later to 84 cents (January 10, 1924) (R. 257, 258).

On November 3, 1922, the reasonableness of rates on sugar charged by carriers from California points to Phoenix, Arizona, was challenged by Phoenix shippers in a complaint filed before the Interstate Commerce Com-

*—All rates herein are stated in amounts per 100 pounds.

mission, as provided in Section 13 of the Transportation Act (R. 277). On January 6, 1925, in response to this complaint, the Commission rendered its decision in *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 95 *I. C. C.* 244.

In that decision the Commission found that the rate of 84 cents then in effect on sugar from California points to Phoenix was and in the future would be unreasonable, and ordered rates not exceeding 71 cents to be established effective February 25, 1925. The opinion and order in this case are reproduced in the record (R. 276-290). The Commission in this case found that the shippers were entitled to reparation, but no order for the payment of reparation was actually made for the reason that this case was subsequently reopened and consolidated with a number of other cases, in which rates on sugar to Phoenix and other Arizona points were under attack. These consolidated proceedings were decided on March 12, 1928, and were known as *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 140 *I. C. C.* 171. This case is reproduced in the record (R. 290-319). In this case the Commission found that the rates on sugar were unreasonable in the past and during the period in which the shipments of the petitioner were made, to the extent that such rates exceeded 71 cents from southern and 73 cents from northern California points, and that for the future such rates should not exceed 61 cents from southern and

73 cents from northern California points. The Commission further found that the petitioner had been damaged in the amount of the difference between the rates paid and those which would have accrued at the rates therein found reasonable. In conformity with these findings the Interstate Commerce Commission made its order of reparation in favor of the petitioner and against the respondent carriers (R. 46, 47). This order forms the basis for the present actions. Similar orders were made on behalf of other shippers. The shipments of the petitioner upon which reparation was allowed were transported between February 21, 1923, and February 10, 1925, during the period when the rate fixed by the carriers was either 86.5 cents or 84 cents, as hereinabove stated (R. 442). All of such shipments were made subsequent to November 3, 1922, the date upon which the complaint was filed by Phoenix shippers challenging the reasonableness of such rates, in the case of *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 95 *I. C. C.* 244, referred to *supra*. As previously stated, this complaint was not finally determined until March 12, 1928.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the order of the Interstate Commerce Commission, awarding reparation to the petitioner, was invalid.

2. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Transportation Act does not confer jurisdiction upon the Interstate Commerce Commission to award reparation to the petitioner.

3. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Transportation Act is unconstitutional and void in so far as it confers jurisdiction upon the Interstate Commerce Commission to award reparation to the petitioner.

4. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the Interstate Commerce Commission does not have jurisdiction, acting in its quasi-judicial capacity, to award reparation to a shipper after finding that the rate charged the shipper was unreasonable, even though such rate was equal to or less than a maximum rate previously approved by the Interstate Commerce Commission.

5. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the respondent carriers had not violated the Transportation Act.

6. The Circuit Court of Appeals for the Ninth Circuit erred in holding that the petitioner did not pay unreasonable rates and charges for the transportation of its goods during the period for which reparation was allowed by the Interstate Commerce Commission.

7. The Circuit Court of Appeals for the Ninth Circuit erred in reversing the decree of the District Court for the District of Arizona.

SUMMARY OF ARGUMENT

Before proceeding with the argument in this case the petitioner believes it proper to state briefly the position taken by the respondent carriers before the Circuit Court of Appeals for the Ninth Circuit. The carriers contended that the order of reparation allowed the petitioner was invalid, and their grounds for such invalidity may be summarized as follows:

1. The charges assessed upon plaintiff's shipments involved accrued under rates which were conclusively just and reasonable, and in conformity with the requirements of the Interstate Commerce Act, at the times the shipments moved.

(a) The rates successively in effect and applicable upon said shipments were published and assessed by the defendants in conformity with a continuing and effective order of the Commission.

(b) Rates published and assessed in compliance with a continuing valid order of the Commission are thereby conclusively established as just and reasonable rates, and cannot, in legal contemplation, be "unreasonable in fact."

2. The Interstate Commerce Act does not purport to confer jurisdiction upon the Commission to award reparation against rates approved or prescribed by the Commission, or against rates which are less in amount than rates so approved or prescribed.

(a) The Act authorized the Commission to award damages to a private party only when he suffers legal damage because of the violation of the Act by a carrier subject thereto.

(b) The publication and assessment of rates in conformity with a continuing valid order prescribing maximum reasonable rates cannot be a violation of the Act, and therefore cannot give rise to legal damages.

3. If the Interstate Commerce Act is so construed as to confer jurisdiction upon the Commission to order reparation against Commission-made rates, it is to that extent unconstitutional and void, and any orders of the Commission issued in purported exercise of such unconstitutional provisions of the Act are likewise void, in that the enforcement of the Commission's order would deprive the defendants of property without due process of law, and would therefore contravene the Fifth Amendment to the Federal Constitution.

On the other hand, the petitioner's contentions sustaining the validity of the order may be summarized as follows:

1. Section 15 (1), 49 *U. S. C. A., Sec.* 15 (1), confers upon the Interstate Commerce Commission the power to prescribe just and reasonable rates, or the maximum or minimum, or maximum and minimum rates, to be charged by carriers subject to the Act.

(a). The rate prescribed by the Commission's order in *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 95 *I. C. C.* 146 (R. 166-180), was a maximum rate. Under this order, the carriers still possessed the discretionary power to voluntarily charge lesser rates.

2. Section 1 (4 and 5) of the Interstate Commerce Act, 49 *U. S. C. A., Sec.* 1 (4 and 5), requires the carriers to maintain reasonable rates. This places upon the carriers the duty of charging reasonable rates, and such duty is not removed by the approval of a maximum rate by the Interstate Commerce Commission.

(a) Under the Transportation Act every unjust and unreasonable rate is prohibited and declared to be unlawful. A shipper has a property right in and to a reasonable rate.

3. Section 8 of the Transportation Act, 49 *U. S. C. A., Sec.* 8, provides that in case any common carrier shall commit any unlawful act or omit anything required to be done by the Interstate Commerce Act, it shall be liable to the shipper injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of said Act.

(a) Section 9 of the Transportation Act, 49 *U. S. C. A., Sec.* 9, grants to any shipper claiming to be damaged by any common carrier the right either to make complaint to the Interstate Commerce Commission or to

bring suit in a District Court of the United States of competent jurisdiction.

4. Section 13 of the Transportation Act, 49 *U. S. C. A., Sec.* 13, grants to the Interstate Commerce Commission the power and jurisdiction to investigate such complaints as may be filed under Section 9, supra.

5. Section 16 (1) of the Transportation Act, 49 *U. S. C. A., Sec.* 16 (1), confers upon the Commission the quasi-judicial power and jurisdiction to grant awards of reparation for violations of the Transportation Act and to make such necessary orders as may be required directing the carrier to pay to the complainant such sums to which he may be entitled on or before a day named.

6. These provisions of the Transportation Act conferred upon the Commission the necessary power and jurisdiction to make the order of reparation in question, and such order was therefore valid and binding upon the respondent carriers.

7. The petitioner was entitled to reasonable rates and the respondent carriers were only entitled to charge reasonable rates. Therefore returning to the petitioner any excess over a reasonable rate did not amount to taking property of the respondent carriers without due process of law, and the provisions of the Transportation Act, permitting the payment of such reparation, are not contrary to the Fifth Amendment to the Constitution.

The Circuit Court of Appeals for the Ninth Circuit, in holding the order of the Interstate Commerce Commis-

sion to be invalid, practically adopted the views advanced by the respondent carriers.

The argument of the petitioner, hereinafter set forth, will be directed first to a consideration of specific portions of the Transportation Act pertinent to the present question and second to an analyzation of the opinion and decision of the Circuit Court of Appeals for the Ninth Circuit, now before this court for review. The specification of errors set forth in this brief will be covered under these points.

ARGUMENT

I.

THE INTERSTATE COMMERCE ACT CONFERS JURISDICTION UPON THE COMMISSION TO AWARD REPARATION AGAINST RATES WHICH WERE CHARGED UNDER AN ORDER PRESCRIBING A MAXIMUM RATE IF THE RATE CHARGED WAS IN FACT UNREASONABLE.

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1. THE COMMISSION PRESCRIBED A MAXIMUM RATE BUT DID NOT FIX THE JUST AND REASONABLE RATE IN THE PRESENT CASE.

Section 15 (1) of the Interstate Commerce Act, *Title 49, U. S. C. A., Sec. 15 (1)*, reads as follows:

> "* * * The Commission is authorized and empowered to determine and prescribe what will be the just and reasonable * * * rate * * * or rates

* * * to be thereafter observed * * *, or the maximum or minimum, or maximum and minimum to be charged * * *."

This section provides that the Commission may prescribe four types of rates: (1) just and reasonable; (2) maximum; (3) minimum; and (4) maximum and minimum.

In the case reported in 62 *I. C. C.* 412, decided June 22, 1921, the Commission prescribed a rate which should not exceed 96.5 cents. The Commission thus prescribed a "maximum rate" and did not prescribe or fix the "just and reasonable rate." Under Section 1 (4 and 5) of the Transportation Act it was the duty of the carriers to file and publish just and reasonable rates. That is, if a rate less than 96.5 cents was the reasonable rate it was the duty of the carrier to file and publish such rate.

An examination of the history of the present rate as set forth previously in the statement of the case will disclose that the rates upon which reparation was allowed were not in fact fixed by the Commission but were rates which had been filed and published by the carriers, the Commission simply having prescribed a maximum rate. There is a clear distinction between a maximum rate and a fixed, just and reasonable rate. A maximum rate is not necessarily a just and reasonable rate. The fact that the Commission prescribed a maximum rate does not relieve the carrier of the duty under Section 1 of the Transportation Act to file and publish a reasonable rate. If

the rate prescribed by the Commission in 62 *I. C. C.* 412 had been a definite, fixed and reasonable rate the carriers by their own action, as disclosed by the facts of this case, would have violated that order. Under an order fixing a reasonable rate the carriers are required and compelled to file and publish that particular rate and no other. In the present case the carriers did not accept and did not comply with the maximum rate of 96.5 cents but instead filed and published a rate of 96 cents. July 1, 1922, the 96 cent rate was voluntarily reduced ten per cent and on January 10, 1924, the 86½ cent rate was voluntarily reduced to 84 cents. Thus if the 96.5 cent rate had been the just and reasonable rate the actions of the carriers would have been in violation of the Commission's order. However, such voluntary reductions were not at variance with the Commission's order because the rate fixed was a maximum rate and the duty was still upon the carrier to fix and charge a reasonable rate, even though such rate would have been lower than the maximum rate. We believe that it is clear from an examination of the Act that the maximum rate prescribed by the Commission did not relieve the carrier of its duty under Section 1 of the Transportation Act. That duty is a continuing one which must be complied with by the carriers; otherwise the Act will be violated and the shipper entitled to damages because of such violation.

News Syndicate vs. N. Y. Central R. Co., 275 U. S. 179, 187.

This principle was in fact recognized by the Circuit Court of Appeals in its opinion in the present case, as will be hereafter pointed out.

2. PROVISIONS OF THE ACT ANALYZED.

The petitioner believes that by grouping the sections together which confer upon the Interstate Commerce Commission its quasi-judicial power, it will be apparent that the Commission had the power and jurisdiction to award reparation in the present case. Portions of these sections which are not pertinent are omitted. These sections are all found in *Title* 49, *U. S. C. A.*

"Section 1 (4):

It shall *be the duty of every* common carrier subject to this chapter engaged in the transportation * * * of property * * * *to establish just and reasonable rates,* fares and charges applicable thereto. * * * *" (Emphasis supplied.)

"Section 1 (5):

All charges made for any service rendered or to be rendered in the transportation of passengers or property * * * shall be just and reasonable, and *every unjust and unreasonable charge* for such service or any part thereof *is prohibited and declared to be unlawful.*" (Emphasis supplied.)

"Section 8:

In case *any common carrier* subject to the provisions of this chapter *shall do,* cause to be done, or permit to be done *any act,* matter, or thing in this chapter prohibited or *declared to be unlawful,* or shall omit to do any act, matter, or thing in this chapter re-

quired to be done, *such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained* in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (Emphasis supplied.)

"Section 9:

Any person or persons claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit * * * in any district court of the United States of competent jurisdiction * * *."

"Section 13:

Any person, firm, corporation, company, or association * * * complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition * * *."

"Section 16 (1):

If, after hearing on a complaint made as provided in Section 13 of this chapter, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this chapter for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named."

"Section 15 (2):

"* * * *All orders of the Commission* * * * shall continue in force until its further order * * * *unless the same* shall be suspended or modified or *set aside by the Commission*, or be suspended or set aside by a court of competent jurisdiction." (Emphasis supplied.)

Section 1 (4 and 5) above quoted requires the carrier to charge a just and reasonable rate and declares that any unjust and unreasonable rate is prohibited and unlawful. Section 8 gives the shipper a right to damages whenever the carrier shall commit any act declared by the Interstate Commerce Act to be unlawful. Sections 9 and 13 give the shipper a right to file a complaint before the Interstate Commerce Commission in the event of a violation of the Act by the carrier. By these sections the shipper's common law remedy to resort to the courts has been abrogated, the Commission being substituted for the courts. Section 16 (1) gives the Interstate Commerce Commission the right as a judicial body to award reparation when any unlawful act is committed by the carrier; that is, Section 16 gives the Interstate Commerce Commission power as a judicial body to act retroactively and to award reparation whenever damages arise as provided in Sections 8 and 9. Section 15 (2) gives the Commission the power to set aside a previous order.

In view of these specific provisions of the Transportation Act, the petitioner believes that the Commission

had a clear conception of its judicial power and properly interpreted its right to award reparation in the present case.

It is fundamental in this case that a carrier is entitled only to a just and reasonable rate and reasonable compensation for the service rendered is all that a common carrier is permitted to exact.

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.

It has also been expressed by this court in the following manner:

> "By investment in a business dedicated to the public service the owner so recognizes that as compared with investment in private business he cannot expect either high or speculative dividends, and that his obligation limits him to only fair or reasonable profit."
> *Dayton-Goosecreek R. Co. vs. U. S.*, 263 U. S. 456.

This court also, in considering the rights of a shipper to reparation, has stated:

> "The carrier ought not to be allowed to retain illegal profit, and the only one who can take it from him is the one that alone was in relation with him and from whom the carrier took the same."
> *S. P. Co. vs. Darnell-Taenzer Lumber Co.*, 245 U. S. 531.

3. ALLOWANCE OF REPARATION IN PRESENT CASE ONLY RECOURSE OF SHIPPER, AND IS AUTHORIZED BY ACT REGULATING INTERSTATE COMMERCE.

The shipper is compelled to pay the duly filed and published tariff whether such tariff is Commission-made or Railroad-made.

Gr. Northern R. Co. vs. Merchants Elevator Co., 259 U. S. 285, 291;
L. & N. R. Co. vs. Maxwell, 237 U. S. 94;
Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426.

In the last case cited this court said:

"Concluding as we do that a shipper seeking reparation predicated upon the unreasonableness of the *established* rate, he must under the Act regulating commerce primarily invoke redress through the Interstate Commerce Commission." (Emphasis supplied).

This court did not differentiate between a Commission-made or a Railroad-made rate, but referred only to relief from an "established rate".

There is no distinction between a tariff published by the railroad and one prescribed by the Interstate Commerce Commission; both are binding upon the shipper. Therefore the only recourse for the shipper is to pay the regular tariff, and if such tariff is unreasonable seek recovery before the Interstate Commerce Commission acting as a judicial body. To hold that the shipper would be foreclosed in such a proceeding because of the prior finding and order of the Commission acting as a legislative body would amount to depriving him of his private property without due process of law if in fact the rate charged was unreasonable.

The right to a reasonable rate is a vested property right of the shipper.

M. K. and T. R. Co. vs. I. C. C., 164 Fed. 645.

This has been further stated by a Federal Court as follows:

> "We are of the opinion that the right of a shipper to have his property carried at a reasonable rate in the transaction of his business *is a right of property*, that to enforce such right our system of jurisprudence does not leave him remediless * * *." (Emphasis supplied.)
> *McLean Lumber Co. vs. U. S.* 237 Fed. 460, 466.

Thus we conclude that the Interstate Commerce Act clearly conferred upon the Interstate Commerce Commission the power to award reparation to the petitioner against rates which were charged, if the rates charged were in fact unreasonable, although such rates may have been equal to or less than a maximum rate previously prescribed by the Commission.

II.

OPINION OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT IN THE PRESENT CASE ANALYZED.

1. CHARACTER OF THE RATE PRESCRIBED BY THE COMMISSION IN *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Director General, et al.*, 62 *I. C. C.* 412.

The opinion of the Circuit Court of Appeals for the Ninth Circuit was written by Judge Wilbur and for the sake of brevity we shall hereafter refer to this opinion as that of Judge Wilbur.

Judge Wilbur, in analyzing the character of the rate prescribed in the First Case, states that it was a maximum rate. He then examines Section 15 (1) of the Interstate Commerce Act with reference to the four classes of rates provided for therein. The purpose of the maximum rate is stated by him as follows:

> "In our opinion the provisions in regard to the maximum or minimum rate were largely for the convenience of the Commission in dealing with the extremely intricate question of freight rates. In the case at bar freight rates were involved from a number of California points to a number of Arizona points. The Commission did not undertake to fix rates from each separate point in California to each separate point in Arizona, and made a blanket order fixing a maximum rate, and not only authorized but directed the carrier to establish its rates within that maximum. *In so doing it was incumbent upon the carrier to conform to certain principles in rate making*, including, perhaps, the principle of long and short haul." (Emphasis supplied.) (R. 448).

In other words, Judge Wilbur admitted that under a maximum rate order "it was incumbent upon the carrier to conform to certain principles in rate making." When we remember that the cardinal principle of rate making is to fix a just and reasonable rate, as set forth in Section

1 of the Act, it will be readily appreciated that Judge Wilbur recognized that under a maximum rate order the duty still rests upon the carrier to fix and charge a just and reasonable rate; that is, under a maximum rate order of the Commission the carrier is not relieved of the duty placed upon it by Section 1 of the Act. If the carrier fails in this duty and the shipper is damaged, then such shipper has a right, under Sections 9 and 13 of the Act, to file a complaint setting forth his damages by reason of the violation of the carrier's duty, and the Commission, under Section 16 of the Act, has a right to allow same if the facts and evidence show the existence of such damage to the shipper.

Judge Wilbur, further considering a maximum rate, continues:

> "It is clear that a blanket order fixing a maximum rate from a state as large as California to an adjoining state might result in individual rates that would be in fact unreasonable and unjust. * * * If new conditions arose later which rendered rates fixed by the carrier unreasonable, the shipper affected could ask for the establishment of a new rate. The Commission could then re-examine the situation and establish a new rate, but there is no reason why an allowance of reparations should be made. The shipper's remedy would be a seasonable application for a change of rate before any serious damage had been suffered." (R. 451).

Thus we find that the Circuit Court of Appeals conceded that simply because a maximum rate has been pre-

scribed by the Commission such rate cannot be conclusively as a matter of fact reasonable. The court, in recognizing that such a condition might exist, failed to consider the commanding force of Section 1 (4 and 5) of the Act, which requires every rate and charge to be just and reasonable. Therefore, when a rate becomes unreasonable because of conditions or because "some individual rate would be in fact unreasonable and unjust" such rate necessarily violates Section 1 and is unlawful. Under Section 16 of the Act, when the Commission shall determine that a complainant has been injured because of the violation of some provision of the Act, then the Commission can and should allow reparation to such complainant. This statement by Judge Wilbur in the opinion discloses the erroneous conclusion reached in holding the order of the Interstate Commerce Commission void in the present case.

In addition, Judge Wilbur stated, as shown in the portion quoted above, that the shipper's remedy would be a seasonable application for a change of rate before any serious damage had been suffered. In the present case there can be no question but that seasonable application was made applying for a change of rate. The order of the Commission in the case of *Traffic Bureau, Phoenix Chamber of Commerce, et al. vs. Director General, et al., supra,* prescribing a maximum rate of 96.5 cents became effective on September 17, 1921. On November 3, 1922, Phoenix shippers challenged the reasonableness of the rates being charged by the carriers. Hence no criticism

can be made that the shippers of Phoenix did not seasonably apply for a change of rate. However, the mills of the Commission grind slowly and the final decision was not made in this matter and on this complaint until March 12, 1928. During all this period, namely, between November 3, 1922, and March 12, 1928, the petitioner with other shippers in Phoenix was compelled to pay the rates then in effect and being charged by the carriers. Every shipment made by the petitioner upon which reparation was allowed moved between these dates.

Judge Wilbur's opinion is silent as to the reasons why the plaintiff should not have been entitled to reparation for shipments made during this period when the rates charged the plaintiff were unjust and unreasonable and therefore in violation of Section 1 of the Transportation Act, in view of the seasonable application for a change of rates. There is nothing in the Interstate Commerce Act that specifically or impliedly takes from the Interstate Commerce Commission the power to allow, retroactively, reparation when the Commission finds that the rates charged the shipper were unreasonable and in violation of the Interstate Commerce Act, especially during the years that litigation before the Commission regarding such rates may be in progress. This was the view of the Commission in the present matter as shown in its report, 140 *I. C. C.* 171 *at Page* 180.

> "If we are within our authority in finding that a lower rate would have been reasonable, then it must

follow that shippers who paid the freight charges at the higher rate paid charges which were unreasonable and are entitled to reparation, upon adequate proof that they paid or bore such charges." (R. 199).

In the absence of such restrictive power we submit that Section 16 of the Interstate Commerce Act is sufficiently broad and comprehensive to sustain the order of the Interstate Commerce Commission in the present case, particularly when the Commission is specifically authorized in this section to allow reparation under such conditions.

2. Dual Character of the Interstate Commerce Commission.

Judge Wilbur correctly states that this Commission is dual in character—at times it acts in a legislative capacity and at other times in a judicial capacity. This distinction has been determined by this court.

Baer Bros. vs. Denver R. G. R., 233 U. S. 479;
Gr. Northern R. Co. vs. Merchants Elevator Co., supra.

It is the view of the petitioner that the Commission, acting in a judicial capacity, has a right to determine, in view of the facts then before it, whether the rate in question was in fact just and reasonable and in compliance with the Interstate Commerce Act. The fact that such rate had been previously prescribed as a maximum rate by the Commission acting in a legislative capacity can-

not be conclusive in such a judicial proceeding. This we believe is a correct statement of the general principles of law. Judge Wilbur takes the position, however, that a court is bound in its determination by the law. Upon this there is no question, but the law as far as shippers and carriers are concerned requires that all rates must be just and reasonable.

In attempting to dispose of this question, Judge Wilbur states:

> "Consequently, if the court finds that a rate has been fixed by law, by the legislature, it must apply that law as a measure of right, and award as excessive only such charges as exceed the rate fixed by law. The Transportation Act (Sec. 16 (1)) delegating power to the Commission to award reparations limits that power to parties entitled to an award of damages under the provisions of this chapter and a violation thereof." (R. 452).

Previously we have quoted a portion of his opinion which admitted that under a maximum blanket rate order it is very possible that an individual rate may be unjust and unreasonable. An unjust and unreasonable rate is in violation of the Act, itself, as set forth in Section 1 thereof. Thus the duty of the Commission acting in its judicial capacity is to determine whether or not under the particular facts and circumstances of the case then before it the rate as applied to the complainant is just and reasonable. In such determination, under the principles

of law and under the provisions of the Interstate Commerce Act, it cannot be bound conclusively by the previously prescribed maximum blanket rate order.

Judge Wilbur, in disposing of the case of *Baltimore and Ohio R. Co. vs. U. S.*, 279 *U. S.* 781, stated:

> "That case merely decided that when the order of the Commission was set aside by the court as illegal the court could order a restoration of funds paid under the erroneous order as a part of the relief granted the parties attacking the validity of the order. This decision does not support the conclusion that a court could set aside a previous judgment or decree in a subsequent suit brought for that purpose merely because in the former suit an erroneous view of the evidence had resulted in the judgment or decree, nor is it authority for the proposition that a court can set aside a law or legislative act because the legislators were induced to pass the legislation by false or erroneous or insufficient evidence." (R. 457, 458).

When this decision of the Supreme Court is considered and applied to the present case we find a similarity of conditions. In this case the court held that a court has the right to set aside an erroneous order of the Interstate Commerce Commission, made in its legislative capacity, and that in setting aside such order it had the power to adjust the rights between the parties litigant. When we remember that the Interstate Commerce Commission in the present case in considering the question of reparation acted as a judicial body, it then becomes clear

that it had the right to consider the correctness of the prior legislative order of the Commission, and if that order was erroneous it could be set aside and the shippers and the carriers be placed in their true lawful position by allowing the shipper a just and reasonable rate. The only method provided for a shipper under the Interstate Commerce Act to attack an unjust and unreasonable rate is to file a complaint before the Commission in accordance with Sections 9 and 13 of the Act.

Texas & Pacific R. Co., vs. Abilene Cotton Oil Co., supra.

Prior to the Transportation Act the shipper secured this relief in the courts, just as the parties in the Supreme Court case above cited obtained their relief in the courts. The fact that the Act took from the shipper the right to a proceeding in court does not mean that the shipper forfeited his lawful rights to a just and reasonable rate. The rights remained the same. Only the remedy and method of procedure were changed. To hold otherwise would result in the shipper being injured by the very act that was intended to benefit and protect him.

3. ALLOWANCE OF REPARATION TO PLAINTIFF DOES NOT VIOLATE FIFTH AMENDMENT TO THE CONSTITUTION.

The opinion of the Circuit Court of Appeals holds that to compel the carriers to comply with the order of the Interstate Commerce Commission in the present case would amount to taking their property without due pro-

cess of law (R. 454, 455). To support this position several cases from this court are cited. We shall not attempt to consider all of these cases in this brief. The cases cited do not deal with the question here presented. On the other hand, this court has held that in the very nature of things there can be no vested right in a rate fixed by the Commission for the future.

Skinner and Eddy Corp. vs. U. S., 249 U. S. 557, 568.

This was further stated by a Federal court as follows:

> "There are no private vested rights in the order of the Commission."
> *I. C. C. vs. L. & N. R. Co.*, 73 Fed. 409, 428.

The only recent case cited by Judge Wilbur is *Blodgett vs. Holden*, 275 U. S. 142. The facts of the case were: Blodgett had made a gift to certain parties during the year 1924, but prior to June 2 of that year, the date of the enactment by Congress of the Revenue Act of 1924. The court held that Congress had no power to impose a charge or tax upon gifts fully consummated before the effective date of the statute. It is to be noted that the act of the taxpayer was fully completed before there was any legislation on the subject. The language of the Supreme Court in this case is:

> "It seems wholly unreasonable that when he, *in entire good faith, without the slightest premonition of such consequence*, made absolute disposition of his

property by gifts he thereafter be required to pay a charge for so doing." (Emphasis supplied.)

Of course, it is wholly incorrect to state that the transportation charges assessed upon the petitioner's shipments were "without the slightest premonition" of a later demand for reparation upon the ground of the unreasonableness of the charges. The Commission had prescribed merely a maximum rate in 1921 and a complaint by Phoenix shippers was filed before the first shipment of the petitioner in the present case moved. The carriers by Section 1 of the Act were under a continuing duty to maintain just and reasonable rates.

Another case cited by the court was *Fletcher vs. Peck*, 10 U. S. 87, in which the court stated:

"But if an act be done under a law, a succeeding legislature cannot undo it."

This case of course does not apply to the present situation. In the first place the law which was in existence at the time the carriers charged the plaintiff the rates upon which reparation was allowed required the carriers to charge just and reasonable rates. (Sec. 1 of the Act). In addition, no succeeding legislature attempted to undo what had been done by a previous legislature. The Commission in allowing reparation in this case acted as a judicial body and not a legislative body.

When we consider the scope, purpose and intent of the Transportation Act, no basis is laid for the position

taken by Judge Wilbur in this regard. The carrier acquires no vested right in any income in excess of a reasonable return on its investment.

Dayton-Goosecreek R. Co. vs. U. S., supra.

The carrier has only a vested right to a fair return. On the other hand, a shipper has a vested property right entitling him to a reasonable rate. This has been stated by this court as follows:

> "The carrier ought not to be allowed to retain illegal profit, and the only one who can take it from him is the one that alone was in relation with him and from whom the carrier took the sum."
> *S. P. Co. vs. Darnell-Taenzer Lumber Co., supra.*

This right of property in the shipper has been recognized by a Federal court as follows:

> "We are of the opinion that the right of a shipper to have his property carried at a reasonable rate in the transaction of his business *is a right of property,* that to enforce such right our system of jurisprudence does not leave him remediless * * *." (Emphasis supplied.)

McLean Lumber Co. vs. U. S., supra.

The authorities cited by Judge Wilbur are not in conflict with these recognized vested rights of both shipper and carrier. They do not justify or require that the reparation order here in question be held invalid.

4. Decisions of State Courts Relied Upon By the Circuit Court of Appeals Do Not Support the Conclusions Reached By the Court.

Judge Wilbur supports his position in the present case by the decisions of various State Courts (R. 455, 456). In truth, these decisions fail to support the opinion of the Circuit Court of Appeals in the present case and generally support the position taken by the petitioner. These same decisions of the various State Courts were called to the attention of the Circuit Court of Appeals for the Fifth Circuit in the case of *Eagle Cotton Oil Company vs. Southern Railway Company*, 51 Fed. (2d) 443, decided July 21, 1931.

Judge Hutcheson in his opinion in considering these cases states:

> "The invoked decisions of the state courts do not support the position of appellee (carriers) here. They make strongly against it. They show that instead of the states having a ratemaking system like the federal one, not rigid, but flexible, which permits its Commission from time to time and at any time to make orders changing rates, correcting abuses, reforming conditions and awarding reparations, while in reliance upon the power of the Commission to retroactively repair injuries sustained as the result of their prospective orders, shippers may experimentally try out rates before resorting to the courts for relief, their systems are rigid and inflexible.

"Under their systems their Commissions make their rates, and until set aside by the courts they are final and conclusive on carrier and shipper alike."

Judge Hutcheson then analyzes two decisions from Texas: *M. K. & T. R. Co. vs. R. R. Commission*, 3 S. W. (2d) 469 and *Producers' Refining Co. vs. M. K. & T. R. Co.*, 13 S. W. (2d) 679, and one from Louisiana: *Texas & Pacific Ry. Co. vs. R. R. Commission of La.*, 69 So. 837, and concludes that in no sense do they sustain the position of the carriers, and he continues as follows:

"The courts in both of these states, in fact in all of the states, decisions from which are cited by appellee, give full recognition to the difference in the character and structure of the jurisdiction exercised by the Interstate Commerce Commission and that exercised by their own Commissions."

We shall not attempt in this brief to analyze each of these cases relied upon by Judge Wilbur, in view of the conclusions reached by Judge Hutcheson above quoted. Comments from three of these cases are so pertinent, however, that we shall refer to them.

In the case of *Mathewson Alkali Works vs. N. & W. Ry. Co.*, (Va. 1927), 137 S. E. 608, the court said:

"*Under the Federal law express power is conferred upon the Interstate Commerce Commission to declare rates unreasonable and discriminatory retroactively and to award reparation* while following the granting of power to the State Corporation Commis-

sion to authorize and prescribe rates—there is no express grant of power to declare them unreasonable retroactively." (Emphasis supplied.)

To the same effect is the case of *Texas & Pacific R. Co. vs. R. R. Commission of La., supra.* In this case the court said:

"Nor are we able to see in what way the particular rulings of the United States courts to which we are referred, relating to the power of the Interstate Commerce Commission, can affect the issue presented in this case since those rulings are predicated *upon an act of Congress which confers upon that commission judicial powers and a certain jurisdiction concurrent with that of the circuit and district courts of the United States;* whereas all such power and jurisdiction are withheld from the defendant (Louisiana R. R. Commission) herein." (Emphasis supplied.)

In the case of *Young Heading Co. vs. Paine* (Miss. 1921), 89 So. 782, 786, the court recognized the distinction between maximum and fixed rates.

"An examination of the cases cited shows that the statutes (Interstate Commerce Act) therein involved provided for fixing of *maximum rates* by the Commission and not rates either above or below which the carriers were allowed to charge, as does our statutes."

Thus these State Courts which we have examined, as well as the others relied upon by Judge Wilbur, clearly

point out the distinction between the Interstate Commerce Act, in which the Commission is given broad and comprehensive powers including the right to prescribe a maximum rate, and the State Acts in which their Commissions are given limited and restricted powers and the right to fix only the exact rate. Judge Wilbur by accepting these decisions as authoritative in the present case, has placed the Interstate Commerce Commission in the same category with the state regulatory bodies. This is not justified and is wholly incorrect, as shown by the very authorities cited by him.

5. CONSIDERATION OF THE DECISION OF THE DISTRICT COURT IN *Eagle Cotton Oil Company vs. Southern Railway Company*, 46 *Fed.* (2d) 1006, RELIED UPON BY THE CIRCUIT COURT OF APPEALS.

In addition to the state decisions referred to by Judge Wilbur, reliance was placed upon the decision of the United States District Court for the Southern District of Mississippi in the case of *Eagle Cotton Oil Company vs. Southern Railway Company*, 46 Fed. (2d) 1006. Judge Wilbur, in relying upon this decision, states:

"A similar decision was rendered September 16, 1930, by the United States District Court for the Southern District of Mississippi in Eagle Cotton Oil Company vs. Southern Railway Company (not yet reported), wherein the order of the Interstate Commerce Commission in a case of the same title, reported in 140 I. C. C. 131, granting reparations for excessive rates that had been fixed by the Commission, was held void." (R. 456).

This decision of the District Court was appealed and since the rendition of the opinion by Judge Wilbur in the present case the Circuit Court of Appeals for the Fifth Circuit reversed the decision of the District Court and upheld the order of the Interstate Commerce Commission, thereby granting reparation to the shipper. This decision is entitled *Eagle Cotton Oil Co. vs. Southern Railway Company,* and is reported in 51 Fed. (2d). 443.

We would direct this court's attention particularly to the concurring opinion of Judge Hutcheson in this case, in which he considered the decision of the Circuit Court of Appeals for the Ninth Circuit in the present case and said:

> "In the opinion of the Circuit Court of Appeals in Atchison, Topeka & Santa Fe vs. Arizona Grocery Co., 49 F. (2d) 563, 568, holding that the Commission could not award reparation as to the rates specifically theretofore prescribed by it, it is said that under such circumstances 'The shipper's remedy would be a seasonable application for a change of rate before any serious damage had been suffered.'
>
> "In my opinion this will not do. This is indeed the remedy, and the only remedy the shipper has under the state systems. This is, however, not the case under the federal system. Here the remedy is simpler, more efficacious, more reasonable, more just to shipper and carrier alike, and more consonant with the experimental character of rates and ratemaking. This system permits rates to be experimentally laid down and experimentally tried out. It

preserves that flexibility of adaptation, the maintenance of which is necessary to the life and growth of our great and changing commerce, which would be lost and defeated if immediate resort to the courts were necessary, as in the state systems, to protect the rights of shippers against the burdens of an experimental rate.

"This system, without fixation or rigidity, leaves it to the Commission to deal justly and fairly by carrier and shipper alike, authorizing it to use its powers to effect and maintain a reasonable rate structure through constant experiment and change, while preserving to it the right at any time upon complaint to relieve by specific reparation awards those who have suffered from the temporary inequalities and imperfections of this rate structure.

"For the courts to now hold, in the absence of some specific and compelling Congressional command, that such a system, so flexible, so reasonable, so adapted and adaptable to the commerce of this nation, so long an integral part of its operations under the sanction of the courts, is not in accordance with the law, would be in my opinion unwise, unreasonable and wholly without legal warrant."

The interpretation of the Transportation Act by Judge Hutcheson, as above set forth, is diametrically opposed to the interpretation placed upon the Act by Judge Wilbur. In the present case, all shipments made by the petitioner upon which reparation was allowed were made between the date of the filing of the complaint charging

the reasonableness of such rates and the date upon which the Commission finally determined such complaint. This is admitted by the respondent carriers. Under Judge Wilbur's decision the petitioner is deprived of recovery from the carriers, regardless of how unreasonable the rate may have been during this period. Under Judge Hutcheson's opinion the petitioner would be allowed to recover the damages sustained by reason of the payment of unreasonable rates. We submit that the opinion of Judge Hutcheson is in accord with the spirit and intent of the Interstate Commerce Act, while that of Judge Wilbur is violative of both.

6. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS BASED UPON AN IMPLIED RESTRICTION IN THE POWER OF THE INTERSTATE COMMERCE COMMISSION. THE PROVISIONS OF THE ACT DO NOT JUSTIFY SUCH IMPLIED RESTRICTION.

Judge Wilbur's decision is founded upon an implied restriction in the power of the Interstate Commerce Commission. Congress has not seen fit to limit specifically the power of the Interstate Commerce Commission in the manner in which it is restricted by the decision of the Circuit Court of Appeals in the present case.

As originally enacted, the Transportation Act made it the duty of the carriers to charge just and reasonable rates and to give to every shipper injured by any violation in that respect a remedy by complaint before the Commission. The Commission has always had the power to

determine and award damages in such cases. Since this act was originally enacted the Commission's power and jurisdiction have been greatly enlarged, but never have the carriers been relieved of the duty placed upon them by the common law, and as re-stated in Section 1 of the Act, to keep their rates just and reasonable. Neither has the Commission ever been relieved of its duty to hear and determine complaints against carriers alleging damages resulting from the failure to perform this absolute duty.

Certainly the carriers cannot successfully contend that a rate once prescribed will remain for all times just and reasonable. The fact that such rate may have been passed upon and approved by the Commission does not guarantee that such rate will be just and reasonable at all times thereafter or until changed by the Commission.

"Transportation conditions are not static; the oppressor of today may tomorrow be the oppressed."
Skinner and Eddy Corp. vs. U. S., supra.

The Commission has also many times recognized this principle.

"A rate which is reasonable today may tomorrow, by reason of changing circumstances and conditions, become unjust and unreasonable."
Topeka Traffic Assn. vs. A. & V. Ry. Co., 27 I. C. C. 428, 433.

Or otherwise stated:

"In numerous instances the Commission has held, in substance, that a rate may be reasonable at one

period of its existence and because of changed conditions and circumstances become unreasonable at a later period."

New Pittsburgh Coal Co. vs. H. V. Railway Co., 26 *I. C. C.* 121, 125.

Complaints filed before the Interstate Commerce Commission are not generally heard and determined in less than from two to six years. After they are filed and before they are determined it is apparent that a shipper can be damaged by a rate in violation of Section 1 of the Act, without any chance of recovery, if the opinion of Judge Wilbur is sustained. This was not the purpose or intent of the Transportation Act. The purpose of this act was to give to shippers and carriers alike a specialized tribunal which would determine the rights between them and which would see that the shipper secured a just and reasonable rate for the shipment of his goods and the carrier a fair return for its services. In fact, Judge Wilbur clearly recognized this purpose by the following statement:

"The whole purpose of the Act was to create and compel the enforcement, without discrimination, of rates which were just and reasonable." (R. 448).

As time goes on practically all rates in the United States will be at one time or another before the Interstate Commerce Commission. Under Judge Wilbur's decision such rates as are approved by the Commission will

be conclusively just and reasonable, until changed by subsequent order of the Commission, and this regardless of how seriously they violate Section 1 of the Act in their application because of changed conditions or peculiar circumstances. Otherwise stated, Section 1 of the Act will lose its binding force upon the carriers and will therefore become inoperative, regardless of how unreasonable and unjust the rate to the shipper may in fact become pending the time that such rate will be changed by the Commission for the future. Thus Judge Wilbur has concluded that a carrier may exact rates even though unjust and unreasonable, without violating the Interstate Commerce Act, provided only that the rates exacted do not exceed a level fixed by order of the Interstate Commerce Commission as a maximum level. Such a conclusion is directly opposed to the true relationship which should exist between common carriers and shippers as recognized by this court.

Dayton-Goosecreek R. Co. vs. U. S., supra;
S. P. Co. vs. Darnell-Taenzer Lumber Co., supra.

This court has further held that a carrier never acquires a vested right in a rate.

Skinner and Eddy Corp. vs. U. S., supra.

Furthermore, if Section 1 of the Act is to be given its true force and effect, then under Judge Wilbur's decision it would be necessary for the Commission to exercise constant supervision of all rates in the United States. It

would be impossible for any tribunal to survey all of such rates and keep them constantly upon a just and reasonable basis. In fact, such a burden could not be met by the Commission, for as the Commission itself said in an *amicus curiae* brief filed herein supporting the Petition for Writ of Certiorari, "It cannot in reason be asserted that the Commission is under the necessity of constant supervision and readjustment of thousands of rates, involving many carriers, to the end that when once established they be kept concurrently reasonable at all times. Surely Congress intended no such burden to be imposed, nor that shippers should be prejudiced by the failure of the Commission to be at all times reviewing established rates to determine their present reasonableness."

7. The Decision of the Circuit Court of Appeals in This Case Conflicts With the Principles of Interpretation and Application of the Interstate Commerce Act Previously Laid Down By This Court.

Judge Wilbur recognized that the opinion of the Circuit Court of Appeals in the present case was not in accord with an early decision of this court. His statement to this effect was as follows:

> "There are statements in the opinion of the Supreme Court in Reagan vs. Farmers L. and T. Co., 154 U. S. 362, 367, that militate against the views herein expressed." (R. 458).

The actual portion of the decision of this court to which he referred is as follows:

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that if a carrier attempted to charge a shipper an unreasonable sum the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. *The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates.* The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable and such as to work a practical destruction to rights of property, and, if found so to be, to restrain its operation. In Chicago, B. & W. R. Co. vs. Iowa, 94 U. S. 155 (24 L. Ed. 94), and Peik vs. Chicago & N. W. R. Co., 94 U. S. 164 (24 L. Ed. 97), the question of legislative control over railroads was presented, and it was held

that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control." (Emphasis supplied.)

Recognizing that the shipper now must file his complaint before the Commission and that the Commission in allowing reparation acts as a court, the above portion of the opinion is peculiarly applicable to the present case.

Judge Wilbur describes this portion of the opinion of the Supreme Court as dictum, and states that it is inconsistent with the theory of reparation for excessive or discriminatory rates stated in *Mitchell Coal and C. Co. vs. Pa. R. Co.*, 230 U. S. 247, 259.

As a matter of fact, an examination of this latter case relied upon by Judge Wilbur discloses that this court adopted the view regarding the allowance of reparation by the Commission urged herein by the petitioner. In the opinion of this case the court referred approvingly to an earlier decision of the Supreme Court, *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., supra.* This last case was decided in February, 1907, and in the opinion at page 442, the court said:

"Although an established schedule of rates may have been altered by a carrier voluntarily *or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal com-*

plaints, of awarding reparation to, individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force." (Emphasis supplied.)

This decision was rendered at a time when the Transportation Act gave the Commission the right to hear complaints concerning the violations of the Act and to order carriers to desist from such violation in the future. This was stated by the court at the time as follows:

"Power was conferred upon the Commission to hear complaints concerning violations of the Act, to investigate the same, and if the complaints were well founded, to direct not only the making of reparation to the injured persons, *but to order the carrier to desist from such violation in the future.*" (Emphasis supplied.)

Thus the Commission had the right under the Act at that time to allow reparation for the past and to order the carriers not to charge in the future rates in excess of that found reasonable.

As stated, the Abilene case was adopted and reaffirmed in the case of *Mitchell Coal and C. Co. vs. Pa. R. Co., supra,* cited by Judge Wilbur. The court not only affirmed the earlier decision but quoted with approval the portion of the opinion of the *Abilene* case, above set forth and then added:

"A contrary ruling would upset a useful, timesaving, economical, and established practice."

This last decision was rendered at a time when the Commission had the power to specifically prescribe a maximum rate as contained in the amendment of July 29, 1906, the same character of rate involved in the present case.

The respective rights of shippers and carriers were fully considered by this court in the Abilene case, supra. The court had before it in that case for the first time the question of procedure to be followed by a shipper who has paid an unreasonable rate. The court considered the question at length, in view of the provisions of the Act, and held that the shipper in such case must file his complaint before the Interstate Commerce Commission, attacking the established rate, and that the Commission in determining the questions presented by such complaint can ascertain if the shipper has been injured by the established rate, whether such established rate be one voluntarily fixed by the carriers or as the result of the enforcement of an order of the Commission. If the shipper has been damaged by the established rate regardless of how established, then the Commission has the right to allow reparation.

Furthermore, in interpreting the Interstate Commerce Act so as to hold the order of the Commission void in the present case, Judge Wilbur failed to consider a fundamental guide given to the courts for the proper interpretation of statutory provisions. It is admitted that the Act does not specifically restrict the Interstate Com-

merce Commission from allowing reparation when it finds a rate to be unreasonable because such rate is equal to or less than a previoously approved maximum rate—in the opinion of Judge Wilbur such restriction is placed upon the Commission only by implication. On the other hand, Section 1 places the duty on the carrier to charge just and reasonable rates and declares any unjust and unreasonable rate to be unlawful. A maximum rate order such as is here involved permits the carrier to charge a lesser rate without any violation of such order. This court and the Commission have held that a rate at one time reasonable does not remain such under changed circumstances and conditions. Sections 9 and 13 give the shipper a right to file a complaint before the Commission when the carrier violates the Act. Section 16 confers jurisdiction upon the Commission to allow reparation, if it finds such violation resulting in damage to the complainant. Thus we find in the provisions of these sections a logical construction justifying the order of the Commission in the present case. This court has established a principle of interpretation which fits the present circumstances.

"It is well settled that where the language of a statute is in any manner ambiguous or the meaning doubtful, resort may be had to the surrounding circumstances, the history of the times and the defect or mischief which the statute was intended to remedy."

Smith vs. Townsend, 148 U. S. 490.

Now let us apply this principle to the present case. This court has previously considered the purposes of the Interstate Commerce Act and the defects intended to be corrected by its enactment.

> "The principle objects of the Interstate Commerce Act were to secure just and reasonable charges for transportation;—and to prohibit unjust discrimination."
> *I. C. C. vs. Baltimore R. Co.*, 145 U. S. 265.

Or otherwise stated:

> "The broad purpose of the Act was to compel the establishment of reasonable rates and uniform application."
> *Chicago & A. R. Co. vs. Kirby*, 225 U. S. 155.

Thus the principal object of the Act was to assure reasonable rates to the shipper, and the defect to be cured was the exaction of unjust and unreasonable rates. That the rates charged the petitioner were unjust and unreasonable *in fact* is conclusively determined by the finding of the Commission. No evidence to the contrary has ever been submitted by the carriers at any stage of these proceedings. Their only contention has been that such rates were conclusively just and reasonable, *not in fact*, but because the Commission prescribed a prior maximum rate a year and a half before the first shipment of sugar was made by the petitioner upon which reparation was allowed. Judge Wilbur's interpretation results in the Act defeating the very purpose for which it was passed and thereby failing to cure the defect intended to be remedied.

We therefore conclue that although the specific question here presented has not been before this court previously, earlier decisions of this court have established principles of application, construction and interpretation not in accord with the opinion of Judge Wilbur in the present case. This conflict requires the reversal of the decision of the Circuit Court of Appeals herein.

CONCLUSION

In conclusion the petitioner desires to point out that the decision of the Circuit Court of Appeals now before this court for review, rests upon three erroneous assumptions:

The first, that a maximum rate prescribed by the Commission relieves the carriers of the duty fixed by Section 1 of the Act;

The second, that in considering the question of reparation the Commission was conclusively bound by its prior order prescribing a maximum rate;

The third, that a carrier acquires a vested right to charge a rate even though unreasonable, if such rate is equal to or less than a prescribed or maximum rate.

No authorities sustain any of these assumptions. As to the first, if a maximum rate were identical with a fixed just and reasonable rate there would be no purpose or mean-

ing in *Section* 15 (1) of the Interstate Commerce Act providing for four types of rates: just and reasonable; maximum; minimum; maximum and minimum.

As to the second assumption, the petitioner submits that it is contrary to the entire purpose and intent of the Act, namely: the assurance to shippers of a just and reasonable rate. We believe that this assumption is contrary to the broad and salutary principles of construction and interpretation of the Interstate Commerce Act previously established by this court in the decisions cited in this brief. These decisions sustain the position of the petitioner and in addition set forth the procedure to be followed by a shipper when injured by an unjust and unreasonable rate. This procedure was followed by the petitioner in this case.

Third, as to the vested right of the carrier, no case has been cited by Judge Wilbur holding that a carrier has a vested right in any rate other than a just and reasonable rate. In *Phoenix Chamber of Commerce, et al. vs. Atchison, Topeka & Santa Fe Railway Company, et al.*, 140 *I. C. C.* 171, the Commission found that the petitioner had paid unjust and unreasonable rates, as shown by the evidence then before the Commission. The order in the case of *Phoenix Chamber of Commerce, et al. vs. Director General*, 62 *I. C. C.* 412, prescribing a maximum rate, did not give the respondents a vested right to charge an unreasonable rate. No court has ever held that a carrier has a vested right in a rate, even though such rate be equal to or less than a maximum rate order, where

such rate was in fact unjust and unreasonable. To compel the respondents to return any excess over a reasonable rate is not depriving them of property without due process of law but is in fact returning to the shipper illegal profits obtained by the carrier.

The decision of the Circuit Court of Appeals in the present case, holding that the Commission was without jurisdiction to make the award to the petitioner, rests upon no express provision of the Interstate Commerce Act or of any amendment thereto. Without such express provision we believe the opinion of Judge Hutcheson in the *Eagle Cotton Oil Company case, supra,* is more in line with the general principles of law when he states:

> "For the courts to now hold, in the absence of some specific and compelling Congressional command, that such a system, so flexible, so reasonable, so adapted and adaptable to the commerce of this nation, so long an integral part of its operations under the sanction of the courts, is not in accordance with the law, would be in my opinion unwise, unreasonable and wholly without legal warrant."

We believe that Judge Hutcheson's opinion in the *Eagle Cotton Oil Company case, supra,* when applied to the [illegible] problems of rate making, will carry out the true intent and purpose of the Transportation Act, while on the other hand the opinion of the Circuit Court of Appeals in the present case will violate both its purpose and intent and will render the Commission powerless to

enforce the Transportation Act in the manner originally intended by Congress.

For the reasons set forth herein, we respectfully submit that this Honorable Court should reverse the decision of the Circuit Court of Appeals for the Ninth Circuit in the present case.

Respectfully submitted,

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